No. SC 85740

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.*
ST. LOUIS COUNTY, MISSOURI, *et al.*,
Relators

v.

THE HON. DAVID LEE VINCENT, III,
Judge, Circuit Court of St. Louis County, Missouri,
Respondent

Petition for Writ of Prohibition

Brief of Relators St. Louis County, *et al*.

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JURISDICTIONAL STATEMENT

This is an action for an original remedial writ to prevent the Honorable David Lee Vincent, III, Judge, Circuit Court of St. Louis County, from continuing to exercise jurisdiction over Count I in *Investors Title, Inc. v. Janice Hammonds, et al.*, Case Number 01CC-004336, Circuit Court of St. Louis County ("Underlying Action"). This Court has jurisdiction pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

In Underlying Action, Investors Title Company, Inc. ("Investors") brought suit against St. Louis County, Missouri ("County"), Janice Hammonds, Recorder of Deeds ("Recorder"), and Norris Acker, Director of Revenue ("Director") (collectively referred to as "County Defendants") seeking to recover refunds of overpayments arising out of former County employee Margaret King's secretive and criminal practice of filling in blank checks provided by Investors for an amount in excess of the amounts owed by Investors for services provided by the Recorder's office, A5 at ¶ 22. Investors seeks to recover payments alleged to have reached the County treasury years before Investors notified County Defendants that there was any dispute about the charges. A5 at ¶ 22 and A6 at ¶ 25. The First Amended Petition, A1 through 17, prays for damages in excess of

$860,000.00, plus interest, and other relief including attorney fees. Director and Recorder are sued in their official capacities only. A1 at ¶ 2 and A2 at ¶ 4.

The First Amended Petition, A1 through 17, purports to set forth the following claims:

Count I – Declaratory Judgment and Common Law Refund

Count II – Breach of Contract

Count III – Establishment of Prepaid Accounts

Count IV – Neglect of Duty

Count V – Due process claim under 42 U.S.C. § 1983

Count VI – RESPA claim under 42 U.S.C. §1983

Count VII – Equal protection claim under 42 U.S.C. § 1983

Count VIII – Negligence

Count IX - Conversion

In their motion to dismiss the first amended petition, A18 through 21, County Defendants asserted, *inter alia*, the defense of sovereign immunity to Count I, A19 at ¶ 6.

By order dated September 30, 2003, A22, the Circuit Court dismissed Counts II, III, IV, VIII, and IX. As to Count I (Common Law Refund), County Defendants' motion for summary judgment was denied in part and

sustained in part only to the extent of Plaintiff's damages that occurred more than three years prior to Plaintiff's commencement of the suit. A22. As to the federal claims (Counts V, VI, and VII), County Defendants' motion for summary judgment was denied. *Id.* County Defendants' motion to dismiss the first amended petition was denied as moot. *Id.*

In their answer to the first amended petition, A23 through 33, County Defendants reasserted the defense of sovereign immunity to Count I and denied many of the allegations.

On October 28, 2003, the Western District decided *State of Missouri ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W. 3d 188 (Mo. App. 2003), holding that the doctrine of sovereign immunity bars an action for money had and received based on the Criminal Activity Forfeiture Act ("CAFA") unless the plaintiff pleads an express waiver of sovereign immunity for violations of the CAFA transfer provisions. *Atwell* criticizes *Palo v. Stangler*, 943 S.W. 2d 683 (Mo. App. 1997), where the Eastern District held that an action for money had and received is contractual in nature and thus not barred by sovereign immunity.

On November 3, 2003, County Defendants filed their motion for judgment on the pleadings with respect to Count I, A 34 through 35. By order dated November 19, 2003, A36, the Circuit Court, citing *Palo*, again

rejected County Defendants' assertion of sovereign immunity to Count I, finding that Count I alleges a contractual type relationship between Plaintiff and Defendants for money had and received, which is not barred by the doctrine of sovereign immunity because it is contractual in nature. *Id.*

County Defendants sought a writ of prohibition from the Eastern District, which was denied by order dated December 2, 2003. A37. County Defendants then sought a writ of prohibition from this Court, and on January 4, 2004, a preliminary writ was issued.

POINTS RELIED ON

I. COUNTY DEFENDANTS ARE ENTITLED TO AN ORDER PROHIBITING THE CIRCUIT COURT FROM EXERCISING JURISDICTION OVER COUNT I, BECAUSE PLAINTIFF'S ACTION FOR A REFUND OF PAYMENTS THAT HAVE REACHED THE PUBLIC TREASURY IS BARRED BY SOVEREIGN IMMUNITY IN THAT PLAINTIFF HAS NOT ALLEGED AN EXPRESS CONSENT OF THE GENERAL ASSEMBLY OR COUNTY COUNCIL WAIVING COUNTY'S IMMUNITY TO SUIT

Gas Service Company v. Morris, 353 S.W.2d 645 (Mo. 1962)

Kleban v. Morris, 247 S.W.2d 832 (Mo. 1952)

State ex rel. Missouri Department of Agriculture v. McHenry, 687 S.W. 2d 178 (Mo. banc. 1985)

State of Missouri ex rel. Missouri State Highway Patrol v. Atwell, 119 S.W. 3d 188 (Mo. App. 2003)

§ 537.600.1 RSMo 2000

§ 432.070 RSMo 2000

ARGUMENT

I. COUNTY DEFENDANTS ARE ENTITLED TO AN ORDER PROHIBITING THE CIRCUIT COURT FROM EXERCISING JURISDICTION OVER COUNT I, BECAUSE PLAINTIFF'S ACTION FOR A REFUND OF PAYMENTS THAT HAVE REACHED THE PUBLIC TREASURY IS BARRED BY SOVEREIGN IMMUNITY IN THAT PLAINTIFF HAS NOT ALLEGED AN EXPRESS CONSENT OF THE GENERAL ASSEMBLY OR COUNTY COUNCIL WAIVING COUNTY'S IMMUNITY TO SUIT

This Court has unequivocally stated that the doctrine of sovereign immunity applies to actions for money had and received. *Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-648 (Mo. 1962) and *Kleban v. Morris*, 247 S.W.2d 832, 837 (Mo. 1952). The principle that the sovereign cannot be sued without its consent or permission rests upon grounds of public policy, and the law making authority is the proper body to change the public policy and authorize a suit. *Kleban* at 836. Investors does not allege such legislative action here, yet the Circuit Court declined County Defendants' assertion of

sovereign immunity and ruled that an action for money had and received is contractual in nature and thus not barred by sovereign immunity. A36. That ruling is directly contrary to *Kleban* and *Gas Service*. If Count I is not dismissed, the burdens of litigation will be significantly greater than if only the federal claims remain in the case because it will be necessary for County Defendants to develop evidence that would not apply to the federal claims, such as change of circumstances, lack of duress, and the injustice of requiring County Defendants to make restitution for a loss that Investors could have prevented by reconciling its accounts. Additional jury instructions must be prepared, challenged, and defended. Briefs and motions will be longer and require more research. The litigation will be more expensive, more time consuming, and more complex. A writ should be issued to relieve County Defendants of the burdens of defending Count I. *See State ex rel. Missouri Department of Agriculture v. McHenry*, 687 S.W. 2d 178, 182 (Mo. banc. 1985).

Moreover, this case presents an important question of state wide concern: Does the doctrine of sovereign immunity bar an action for a refund of payments that have reached the public treasury, where the plaintiff does not allege a legislative act or constitutional provision

that waives sovereign immunity? In *Palo*, 943 S.W. 2d 683, the Eastern District held that the doctrine of sovereign immunity did not bar plaintiff's action for reimbursement of overpayments of court-ordered child support because a claim for money had and received is contractual in nature and thus not barred by sovereign immunity. In *Atwell*, 119 S.W. 3d 188, the Western District held that the Eastern District's ruling in *Palo* erroneously equated an action for money had and received with an action on a valid authorized contract and ignored binding Supreme Court precedent. A writ should be issued to resolve the conflict between *Palo* and *Atwell*.

A. Standard of Review

When a circuit court permits a claim that is barred by sovereign immunity to proceed, that court is acting outside its jurisdiction and a writ of prohibition is the proper remedy, *State ex rel. Division of Motor Carrier and Railroad Safety v. Russell*, 91 S.W. 3d 612 (Mo. banc. 2002), even where issuance of the writ does not dispose of all counts in the complaint, *see McHenry*, 687 S.W. 2d 178. If the defendant is clearly entitled to immunity, it is not necessary to proceed through trial and appeal to enforce that protection. *State ex rel. St. Louis State Hospital v. Dowd,* 908 S.W. 2d 738 (Mo. App. 1995).

B. Count I is barred by sovereign immunity

Section 537.600.1 RSMo 2000 mandates recognition of sovereign immunity as it existed prior to September 12, 1977, including the sovereign immunity that was recognized in *Gas Service*, 353 S.W. 2d 645, and *Kleban*, 247 S.W. 2d 832. Prior to September 12, 1977, immunity of the sovereign was the rule, not the exception. *State ex rel. Regional Justice Information Service Commission v. Saitz*, 798 S.W.2d 705, 708 (Mo. banc 1990), citing *Bartley v. Special School District of St. Louis County*, 649 S.W. 2d 864, 868 (Mo. banc 1983).

The doctrine of sovereign immunity applies to actions against the state and its political subdivisions, including counties. *Wood v. County of Jackson*, 463 S.W. 2d 834 (Mo. 1971). Since Count I seeks recovery against Director and Recorder in their official capacities, it is an action against County. *Gas Service*, 353 S.W.2d at 647-648.

In *Kleban*, 247 S.W. 2d 832, the plaintiffs sued the state treasurer and other state officials to recover payments of use taxes on motor vehicles collected under a statute that was subsequently declared unconstitutional. This Court held that the action was against the state and could not be maintained in the absence of sovereign consent to be sued, which was not to be implied from the constitutional provision prohibiting deprivation of

property without due process of law. In *Gas Service,* 353 S.W. 2d 645, the plaintiff sued certain state officials in their official capacities and as individuals to recover the amount of a domestication tax alleged to have been illegally assessed against and collected and withheld from the company. This Court held that all of the claims asserted in the first amended petition were barred by the doctrine of sovereign immunity because (a) insofar as recovery was sought against state officials in their official capacities, it was an action against the state and could not be maintained without the consent of the state; (b) the state possessed sovereign immunity to the claim for money had and received; and (c) the company could not recover from the state officials as individuals, where the money had long since reached the state treasury.

Notwithstanding *Kleban* and *Gas Service,* the Eastern District has held that a claim for money had and received is contractual in nature and thus not barred by sovereign immunity. *Palo*, 943 S.W. 2d 683. *Palo*'s rationale is contrary to *Kleban* and *Gas Service* and has been followed only once, in *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. App. 2000), appeal after remand, 68 S.W. 3d 565 (Mo. App. 2002), where the Western District stated in dicta that the doctrine of sovereign immunity did not apply to an action for money had and received for return of funds alleged to have been seized

in violation of the Criminal Activity Forfeiture Act ("CAFA"). Moreover, the *Palo/Karpierz* rationale was criticized in *Atwell*, 119 S.W. 3d 188, where the Western District held that the doctrine of sovereign immunity bars an action for money had and received based on CAFA unless the plaintiff pleads an express waiver of sovereign immunity for violations of the CAFA transfer provisions.

Both *Karpierz* and *Palo* erroneously equated an action for money had and received with an action on a valid authorized contract. *Atwell* at 190-191. An action on a valid authorized contract is not barred by the doctrine of sovereign immunity because when the sovereign enters into a contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance just as any private citizen. *V.S. Dicarlo Construction Co., Inc. v. State*, 485 S.W. 2d 52, 56 (Mo. 1972).

> While *DiCarlo* does stand for the proposition that the State may not be protected by sovereign immunity on some contract actions, it does not hold that all claims against the state sounding in contract, implied contract, or equity are not barred by sovereign immunity. Rather, *DiCarlo* stands for the proposition that the State does have sovereign immunity generally in contract claims but waived that immunity and

consented to be sued when it entered into the contract with DiCarlo Construction.

Atwell at 190.

Dicarlo does not, as Respondent suggests on p. 11 of his suggestions in opposition, stand for the proposition that "a transaction involving mutual obligations creates an implicit waiver of sovereign immunity. " *Dicarlo* held that the decision by the General Assembly to authorize a contract necessarily carries with it the legislative consent to be sued on that contract. *Dicarlo*, 485 S.W. 2d at 56-57. Legislative consent was implied from the action of the General Assembly in authorizing a contract, not from "a transaction involving mutual obligations."

Count I does not allege a legislatively authorized contract. The oral agreement alleged in Count I is void *ab initio* because it does not comply with the mandatory requirements of Section 432.070 RSMo, and consequently such alleged oral agreement cannot now be relied on by Investors for any purpose. *Thies v. St. Louis County*, 402 S.W. 2d 376, 380 (Mo. 1966); *Donovan v. Kansas City*, 175 S.W. 2d 874 (Mo. banc 1943); and *Halamicek Bros. v. St. Louis County,* 883 S.W. 2d 108 (Mo. App. 1994).

Moreover, Count I does not allege any act of County Council or the General Assembly indicating an intent for County to make any payment to

Investors. No consent to suit can be attributed to claims for "money had and received," which by their very nature are based on "an obligation to do justice even though it is clear that no promise was ever made or intended." *Westerhold v. Mulleniz Corp*., 777 S.W. 2d 257, 263 (Mo. App. 1989), quoting *Calamari & Perillo, Contracts*, §1-12 (2d ed. 1977). This is precisely the point that this Court made in *McHenry*, 687 S.W.2d at 181. The Court explained that the waiver of sovereign immunity for suits to enforce legislatively authorized contracts that was described in *V.S. Dicarlo* rests solely and completely on the General Assembly's demonstrated willingness to pay for the contracted services. *Id.* But, where, as here, "there is no indication whatsoever that the [County Council or General Assembly] intended for the [County] to make any payment whatsoever," the sovereign immunity waiver described in *V.S. DiCarlo* does not exist. *McHenry* at 181.

In order to waive sovereign immunity, the sovereign's intent to allow itself to be sued must be express rather than implied. *Bachtel v. Miller County Nursing Home*, 110 S.W. 3d 799, 804 (Mo. banc. 2003). "It is the express statement of the legislature's intent to allow itself to be sued . . . that is dispositive." *Id.* Sovereign immunity may only be waived, and consent to suit be given, by legislative act or constitutional provision. *Kleban*, 247

S.W. 2d at 837. The power to consent to suit belongs solely to the legislature, not to any other state or county actor. *Kleban* at 836; *Regional Justice Information Service*, 798 S.W.2d at 708; *State ex rel. New Liberty Hospital District v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985); and *Fowler v. Board of Regents for the Central Missouri State University*, 637 S.W. 2d 352, 354 (Mo. App. 1982). No court has authority to usurp that power by forging common law exceptions to sovereign immunity under the guise of a "quasi-contract" analysis -- and this Court in *Gas Service* and *Kleban* declined to do exactly that. Count I is barred because it does not allege an express consent of any legislative body waiving County's immunity to suit.

CONCLUSION

Gas Service and *Kleban* compel the conclusion that the Circuit Court was required to dismiss Count I, and, because the Circuit Court did not do so, this Court must issue a writ to compel that action.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 1st day of March, 2004 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 3,275 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

_____
Cynthia L. Hoemann